

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
COUNTY OF WESTCHESTER, NEW YORK) File No. 0003567288
)
Request for Waiver Pursuant to Section 337(c) of)
the Communications Act of 1934, as Amended)

ORDER

Adopted: August 11, 2010

Released: August 12, 2010

By the Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. The County of Westchester, New York (Westchester) filed an application and associated waiver request,¹ to use, for public safety communications purposes, an offset frequency pair consisting of frequencies 476.3000 and 479.3000 MHz. Westchester seeks waiver relief pursuant to Section 337(c) of the Communications Act of 1934, as amended (the Act),² or in the alternative, Section 1.925 of the Commission's rules.³ For the reasons stated below, we grant the request.

II. BACKGROUND

2. Westchester operates on several frequency pairs from the Part 22 spectrum allocation in the 470-512 MHz band under call signs WQBR539 and WQVH394. The Wireless Telecommunications Bureau's former Public Safety and Critical Infrastructure Division (WTB/PSCID)⁴ authorized Westchester's use of certain frequencies by waivers granted in 2004 and 2005, and the Public Safety and Homeland Security Bureau (Bureau)'s Policy Division authorized additional frequencies by waiver granted in 2007, all pursuant to Section 337(c) of the Act.⁵ Westchester states that the previous waiver

¹ See File No. 0003567288 (filed Sept. 3, 2008, as amended Sept. 24, 2008) and Request for Waiver of Sections 22.621, 22.651, 20.9(a)(6), 90.303 and 90.311 of the FCC Rules and Regulations Under Section 337(c) of the Communications Act of 1934, as Amended (Waiver Request).

² 47 U.S.C. § 337(c).

³ See Waiver Request at 6; 47 C.F.R. § 1.925.

⁴ Pursuant to a Commission reorganization effective September 25, 2006, the relevant duties of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunication Bureau were assumed by the Policy Division of the Public Safety and Homeland Security Bureau. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

⁵ See County of Westchester, *Order*, 19 FCC Rcd 23189 (WTB PSCID 2004) (*2004 Order*) (granting an application for five Part 22 paging channel pairs pursuant to Section 337(c) of the Act); County of Westchester, *Order*, 20 FCC Rcd 18852 (WTB PSCID 2005) (*2005 Order*) (granting a modification application for Station WQBR539, Yonkers, New York, pursuant to Section 337(c) of the Act); and County of Westchester, *Order*, 22 FCC Rcd 1872 (PSHSB PD 2007) (*2007 Order*) (granting an application for one Part 22 paging channel pair pursuant to Section 337(c) of the Act) (collectively, the *Westchester Orders*). See also 47 U.S.C. § 337(c).

requests “documented the severe frequency congestion in the New York and New Jersey areas.”⁶ According to the instant waiver request, Westchester asserts that “[t]he frequency congestion situation has not improved,” and “the congestion is even worse today.”⁷ The County argues that “[n]othing has changed to negate the Commission’s previous findings” in the *Westchester Orders* regarding the County’s satisfaction of all five prongs of Section 337(c).⁸ Westchester states that “[t]he requested channels will improve radio service to first responders in Westchester County without causing unacceptable interference to other incumbent licensees.”⁹ Therefore, Westchester “requests that the Commission grant waivers of Sections 22.621, 22.651, 20.9(a)(6), 90.303, 90.311, and any other necessary sections of the FCC Rules and Regulations” to allow it to use the requested frequencies.¹⁰

3. The requested offset frequencies are unusual because they are adjacent to assignable frequencies under both Part 22 and Part 90, but they are not assignable to users under either part. As Westchester describes:

When one looks at the channel allocations for New York in television channel 15, Part 22 operations are authorized in 476/479.0000 to 476/479.3000 MHz. More specifically, Section 22.621 authorizes the highest channel in the 476 MHz range as 476.2875 MHz with a bandwidth of 20 kHz. The channel can be used for point to multi-point operations.¹¹ Similarly, Section 22.651 authorizes 479.2875 MHz as the highest trunking channel in the 479 MHz range with an authorized bandwidth of 20 kHz.¹² Private land mobile operations are authorized in 476/479.3000 to 479/482.0000 MHz. Actual private land mobile channels are between 476/479.30625 MHz and 478/481.99375 MHz, under Section 90.311(a).¹³ This allocation scheme eliminates licensing 476/479.3000 MHz for either Part 22 or Part 90 use. . . . [T]he channel can be license[d] in Westchester County, at 12.5 kHz bandwidth, without causing interference to any Part 22 or Part 90 licensee.¹⁴

4. On March 27, 2009, the Bureau issued a public notice¹⁵ seeking comment on the application and waiver request. The Bureau also sought comment on whether the 700 MHz public safety band would provide a viable alternative, in light of the then approaching June 12, 2009, digital television

⁶ Waiver Request at 2. See also File Nos. 0001801202 and 0002107869.

⁷ Waiver Request at 2.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 6-7. See also 47 C.F.R. §§ 20.9(a)(6), 22.621, 22.651, 90.303, 90.311. Section 20.9(a)(6) states that Part 22 paging and radiotelephone services shall be treated as commercial radio services. Section 22.621 allocates one of the requested frequencies for point-to-multipoint transmitters that support transmitters that provide public mobile service. Section 22.651 allocates the other frequency for assignment to transmitters providing trunked mobile service. Sections 90.303 and 90.311 set forth the frequency ranges available for land mobile use.

¹¹ 47 C.F.R. § 22.621 (citation in original).

¹² 47 C.F.R. § 22.651 (citation in original).

¹³ 47 C.F.R. § 90.311(a) (citation in original).

¹⁴ Waiver Request at 2-3.

¹⁵ See Public Safety and Homeland Security Bureau Seeks Comment on Request for Waiver Filed by the County of Westchester, New York to Use Frequencies Interleaved Between the Part 22 and Part 90 Allocations for Public Safety Communications, *Public Notice*, 24 FCC Rcd 3704 (PSHSB 2009) (*Public Notice*).

transition date and the Commission's actions in facilitating a nationwide, interoperable broadband public safety network.¹⁶ No comments or reply comments were received.

III. DISCUSSION

5. Section 337(c) of the Act provides that the Commission “shall waive . . . its regulations implementing th[e] Act (other than its regulations regarding harmful interference) to the extent necessary to permit” entities “seeking to provide public safety services” to use unassigned spectrum not allocated to public safety if the Commission makes five specific findings: (i) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use; (ii) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations; (iii) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made; (iv) the unassigned frequency was allocated for its present use not less than two years prior to the date on which the application is granted; and (v) granting such application is consistent with the public interest.¹⁷

6. When considering waiver requests filed pursuant to Section 337(c) of the Act, we must first determine whether the applicant is an “entity seeking to provide public safety services.”¹⁸ The Act defines public safety services as “services – (A) the sole or principle purpose of which is to protect the safety of life, health, or property; (B) that are provided – (i) by State or local government entities; or (ii) by non-governmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider.”¹⁹ The *2004 Order* established that Westchester is a public safety entity that provides public safety services, and no intervening circumstances since that time alter our conclusion.²⁰ Next, we consider whether Westchester's petition satisfies the specific showing requirements mandated by Section 337(c) of the Act. We note that an applicant's failure to meet any one of the five criteria constitutes sufficient cause for the Commission to deny a request for waiver under Section 337(c).²¹

7. Based on our review of the record, we find that Westchester has not demonstrated that “no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” pursuant to subsection 337(c)(1)(A).²² Westchester states that “the assignment

¹⁶ *Id.* at 2, *citing* Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229; Development of Operational, Technical and Spectrum Requirements for Meeting Federal State and Local Public Safety Communications Requirements through the Year 2010, WT Docket No. 96-86, *Second Report and Order*, 22 FCC Rcd 15289 (2007).

¹⁷ 47 U.S.C. § 337(c).

¹⁸ *See* 47 U.S.C. § 337(f).

¹⁹ *Id.*

²⁰ *See 2004 Order*, 19 FCC Rcd at 23192 ¶ 7.

²¹ *See* South Bay Regional Public Communications Authority, *Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 33 (1998); Township of Cinnaminson, New Jersey, *Order*, 22 FCC Rcd 4583, 4585 ¶ 6 (PSHSB 2007), *citing* University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2984 ¶ 15 (WTB PSPWD 2001). *See also* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22768-69 ¶ 131 (2000) (footnotes omitted) (*Section 337 Report and Order*).

²² 47 U.S.C. § 337(c)(1)(A).

of the requested channel pair is consistent with the existing waiver decisions and should not require consideration as a new waiver request.”²³ In the previous *Westchester Orders*, WTB/PSCID and the Bureau’s Policy Division found that Westchester’s request for UHF frequencies satisfied this statutory requirement.²⁴ However, given that the June 12, 2009, DTV transition date²⁵ by which broadcasters must vacate the 700 MHz band has passed, in addition to the Bureau’s recent approval of the Region 8 (New York Metropolitan Area) 700 MHz Regional Plan,²⁶ we now consider the 700 MHz public safety channels to be immediately available and ready for assignment.²⁷ Thus, Westchester’s reliance on the *Westchester Orders* from 2004, 2005, and 2007, as precedent is inapposite in light of the change in the regulatory and spectrum environment since those decisions were made. Moreover, because we evaluate every waiver request on its own merits, prior waiver determinations that relied on specific facts and circumstances, although informative, are not dispositive.²⁸ Since Westchester’s current waiver request fails to show that the 700 MHz band is not immediately available, we can not find that it has satisfied subsection 337(c)(1)(A).

8. The Commission has previously apprised Section 337 applicants as follows:

[T]he statutory language is clear in that it expressly requires that no other spectrum allocated to public safety services be available without any qualification. Thus, we believe that the statute requires that there be no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services.²⁹

Consistent with the Commission’s position, the Bureau and WTB have rejected the argument that an applicant must only show either the unavailability of frequencies in its preferred public safety band or, conversely, the unsuitability of frequencies in other public safety bands, for purposes of satisfying Section 337(c) of the Act.³⁰ Because Westchester has failed to satisfy one of the five criteria; specifically, that

²³ Waiver Request at 5.

²⁴ See *2004 Order*, 19 FCC Rcd at 23194 ¶ 10; *2005 Order*, 20 FCC Rcd at 18855 ¶ 8; *2007 Order*, 22 FCC Rcd at 1875-6 ¶ 11.

²⁵ In the DTV Delay Act that was enacted on February 11, 2009, Congress extended the date for the completion of the nationwide DTV transition from February 17, 2009, to June 12, 2009. See DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009). Accordingly, subject to the DTV Delay Act, the Commission extended the analog license terms and adjusted the construction permits for the full power television stations on February 13, 2009. See Implementation of the DTV Delay Act, MB Docket No. 09-17, *Report and Order and Sua Sponte Order on Reconsideration*, 24 FCC Rcd 1607 (2009).

²⁶ See Public Safety and Homeland Security Bureau Approves Region 8 (New York Metropolitan Area) 700 MHz Regional Plan, PS Docket No. 06-229, WT Docket No. 02-378, *Public Notice*, 24 FCC Rcd 5317 (PSHSB 2009).

²⁷ See, e.g., County of Los Angeles, California, *Order*, 23 FCC Rcd 18389, 18398 ¶ 19 (PSHSB 2008).

²⁸ See Intelsat LLC, *Order on Reconsideration*, 15 FCC Rcd 25234, 25245-46 ¶ 32 (2000).

²⁹ In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as amended, WT Docket No. 99-87, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 22709, 22769 ¶ 132 (2000) (*Balanced Budget Act Report and Order*) (footnotes omitted); see also H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 579-80 (1997) (“Conference Report”) (“spectrum must not be immediately available on a frequency already allocated to public safety services.”).

³⁰ See County of Marin, California, *Order*, 22 FCC Rcd 9165, 9167-68 ¶ 6 (PSHSB PD 2007); State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439, 446-47 ¶ 15 (WTB PSPWD 2002); State of Tennessee Department of Transportation, *Order on Reconsideration*, 15 FCC Rcd 24645, 24648-49 ¶ 9 (WTB 2000).

“no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use,” we need not and do not address its arguments regarding the remaining four criteria.³¹ Thus, we find that Westchester does not satisfy the first criterion of Section 337(c), and therefore Westchester cannot obtain waiver relief pursuant to Section 337.

9. However, our finding that Westchester does not warrant waiver relief pursuant to Section 337 of the Act does not foreclose our consideration of Westchester’s alternative request for waiver relief pursuant to Section 1.925 of the Commission’s rules.³² The Commission has stated that “an applicant that could not obtain relief pursuant to Section 337 because public safety spectrum was available in other bands could nonetheless seek a rule waiver pursuant to Section 1.925 of the Commission’s Rules.”³³ The ability of the Commission to waive its rules stems from the Commission’s plenary authority under the Act to take the actions necessary to achieve the Commission’s over-arching statutory purposes, which include “promoting safety of life and property through the use of radio communication.”³⁴ Thus, Section 1.925 provides the Commission the necessary flexibility to achieve its statutory objective of safeguarding life and property by considering an applicant’s request for waiver relief according to the standards that an applicant must meet under the rule.³⁵ From our review of the record in this case, we find that, despite Westchester’s failure to meet the first criterion for receiving Section 337 waiver relief, the record contains sufficient information for us to consider whether waiver relief is justified under Section 1.925.³⁶ We therefore consider its request pursuant to Section 1.925.

10. Section 1.925 states that to obtain a waiver of the Commission’s rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the requested waiver would be in the public interest;³⁷ or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁸ An applicant seeking a waiver faces a high hurdle and must plead with

³¹ See, e.g., *Hennepin County, Order*, 14 FCC Rcd 19418 (WTB 1999) (having noted failure of Hennepin County to meet one of the criteria, Bureau did not address remainder); *New Hampshire Department of Transportation (NHDOT), Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 (WTB 1999) (after having determined that New Hampshire failed to demonstrate that no other spectrum allocated to public safety service was immediately available, Bureau noted that it “need not address whether NHDOT has submitted evidence that would allow us to make the other findings required by Section 337(c)(1) of the Act.”).

³² 47 C.F.R. § 1.925.

³³ *Section 337 Report and Order* at 22769 ¶ 132 n.366, citing 47 C.F.R. § 1.925. See also Letter to Alan S. Tilles, Esq., 22 FCC Rcd 13577, 13581 & n.30 (WTB MD 2007) (noting that “[i]n addition to the Section 337 process, [public safety] entities can also seek a conventional waiver under Section 1.925 of rules.”); *County of Granite, Montana, Order*, 24 FCC Rcd 5704, 5711 ¶ 17 (PSHSB PD 2009) (*Granite Order*).

³⁴ 47 U.S.C. § 151; see also 47 U.S.C. §§ 154(i), 303(r).

³⁵ See 47 C.F.R. 1.925 (providing that “[t]he Commission *may* waive specific requirements of the rules upon its own motion or upon request”) (emphasis added). See 47 C.F.R. § 1.925(b)(3)(i)-(ii) (setting forth the criteria).

³⁶ See *Granite Order*, 24 FCC Rcd at ¶ 17.

³⁷ See 47 C.F.R. § 1.925(b)(3)(i).

³⁸ See 47 C.F.R. § 1.925(b)(3)(ii).

particularity the facts and circumstances that warrant a waiver.³⁹ For the reasons discussed below, we find that Westchester meets the first prong of the waiver standards, and accordingly grant the Waiver Request.

11. *Sections 22.621, 22.651, 90.303, and 90.311.* We begin our analysis by examining whether the waiver would undermine the purpose of the rules sought to be waived. In a 2003 decision involving similarly situated offset channels, WTB/PSCID determined that “[t]he purpose of the rules for which a waiver is sought is to assign paging control channels under Part 22 with sufficient guard band spacing to adjacent private land mobile radio operations under Part 90.”⁴⁰ Accordingly, we evaluate the licensing landscape in the New York City metropolitan area. On the lower adjacent Part 22 frequencies 476.2875 and 479.2875 MHz, while there are no Part 22 licensees, there are public safety land mobile licensees. Specifically, Syosset Fire District, New York (Syosset) operates on these frequencies under call sign WPYJ816; County of Morris, New Jersey (Morris) operates on frequency 476.2875 MHz under call signs WQKW845 and WQKW848; and County of Somerset, New Jersey operates on frequency 479.2875 MHz under call signs WPPB311 and WQBL367.⁴¹ On the upper adjacent Part 90 frequencies 476.3125 and 479.3125 MHz, the City of New York Police Department (NYPD), a public safety land mobile licensee, operates with 20 kHz bandwidth under call sign WIF539. Based on this licensing environment, no Part 22 entities could be licensed on the requested frequencies 476.3000 and 479.3000 MHz or on the lower adjacent Part 22 frequencies 476.2875 and 479.2875 MHz in the New York City urbanized area. It is not necessary to provide spectral separation between entities in the same service, *i.e.*, public safety private land mobile radio, beyond standard interference protection criteria. Accordingly, based on the foregoing analysis, we find that the underlying purpose of Sections 22.621, and 22.651, 90.303, and 90.311—assigning paging control channels under Part 22 with sufficient guard band spacing to adjacent private land mobile radio operations under Part 90—would not be served or would be frustrated by application to the present case.

12. *Co-channel and adjacent channel licensees.* Although consideration of other PLMR public safety licensees is not germane to the waiver criteria, we examine the licensing environment to elaborate on our statement above that the frequencies are already assigned to public safety entities, and also to fulfill our due diligence to examine whether Westchester would cause harmful interference to these public safety entities or any other entities. Westchester attached a current co-channel study to its application which showed no co-channel land mobile users operating within 64 kilometers of Westchester’s location.⁴² Based on this information and our independent analysis, we are persuaded that no co-channel land mobile users will be affected.

³⁹ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff’d*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

⁴⁰ *City of Burbank, California, Memorandum Opinion and Order*, 18 FCC Rcd 23770, 23772 ¶ 2 (WTB PSPWD 2003). Similar to Westchester, City of Burbank requested an offset frequency pair “located in a guard band between spectrum allocated for Part 90 (private land mobile radio) and Part 22 (paging control).” *Id.* at 23771 ¶ 3.

⁴¹ All three entities obtained waivers to operate on Part 22 frequencies. See Syosset Fire District, *Memorandum Opinion and Order*, 18 FCC Rcd 16635 (WTB PSPWD 2003); County of Morris, New Jersey, *Order*, 24 FCC Rcd 12492 (PSHSB PD 2009); Seven Public Safety Agencies in the New York Metropolitan Area, *Order*, 19 FCC Rcd 15355 (WTB PSCID 2004).

⁴² See File No. 0003567288, attached Co-Channel Study.

13. Next, we consider adjacent channel licensees. At the time Westchester filed its waiver request and application, Westchester attached a then-current adjacent channel study for frequency 476.3000 MHz which identified Syosset and NYPD as potentially affected entities.⁴³ Subsequent to Westchester's filing, the Bureau's Policy Division granted Morris's waiver, so we consider Morris in our analysis as well.⁴⁴ Syosset operates on the lower adjacent Part 22 frequencies 476.2875 and 479.2875 MHz with 11.25 kHz bandwidth under call sign WPYJ816, and Morris operates on frequency 476.2875 MHz with 11.25 kHz bandwidth under call signs WQKW845 and WQKW848.⁴⁵ Because frequencies 476.2875 and 479.2875 MHz are 12.5 kHz removed from requested frequencies 476.3000 and 479.3000 MHz, respectively, Westchester's proposed operation, which is also 11.25 kHz bandwidth,⁴⁶ would create no bandwidth overlap with Syosset and Morris. Therefore, we find that Syosset and Morris would receive no harmful interference, and no further analysis is required.

14. Regarding the Somerset's 20 kHz bandwidth mobile-only operation on frequency 479.2875 MHz under call sign WPPB311, Westchester's proposed 11.25 kHz bandwidth mobile operation on offset frequency 479.3000 MHz would create bandwidth overlap with Somerset. Engineering staff from the Bureau's Policy Division performed an analysis of the frequencies using the interference criteria of TIA/EIA/TSB-88 (TSB-88) and the Land Mobile Communications Council (LMCC) Consensus.⁴⁷ Staff found that Westchester would cause zero percent reduction to Somerset's calculated service area reliability, and vice versa. Therefore, we conclude that Westchester would not cause harmful to Somerset's 20 kHz bandwidth mobile operations on Station WPPB311.

15. On the upper adjacent Part 90 frequencies 476.3125 and 479.3125 MHz, the NYPD operates with 20 kHz bandwidth under call sign WIF539.⁴⁸ In this case, Westchester's proposed operation would be 12.5 kHz offset, and would create bandwidth overlap with NYPD on both the base and mobile frequencies. Westchester performed a TSB-88 analysis and determined that Station WIF539 would receive no more than 1.51 percent degradation in service area reliability.⁴⁹ Thus, Westchester is

⁴³ See File No. 0003567288, attached Adjacent Channel Study (Adjacent Channel Study).

⁴⁴ See *supra* n.41.

⁴⁵ See licenses for Stations WPYJ816, WQKW845, and WQKW848.

⁴⁶ See File No. 0003567288.

⁴⁷ See Telecommunications Industry Association/Electronics Industry Association Telecommunications Systems Bulletin 88 (TIA/EIA/TSB-88), *Wireline Communications System – Performance in Noise and Interference-Limited Situations - Recommended Methods for Technology-Independent Modeling, Simulation, and Verification* (January 1998). In 1997, the Commission directed the certified frequency coordinators for the private land mobile radio services to reach a consensus on the applicable coordination procedures for the 12.5 kHz “offset” channels in the 470-512 MHz band. See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, PR Docket No. 92-235, *Second Report and Order*, 12 FCC Rcd 14307, 14330-31 ¶ 43 (1997). That consensus is embodied in the LMCC procedures for evaluating adjacent channel interference in the 470-512 MHz band using the interference criteria of TSB-88. See Filing Freeze to Be Lifted for Applications Under Part 90 for 12.5 kHz Offset Channels in the 421-430 and 470-512 MHz Bands, *Public Notice*, 13 FCC Rcd 5942, 5942 (WTB 1997) (citing Letter from Larry A. Miller, President, LMCC, to Daniel B. Phythyon, Esq., Acting Chief, Wireless Telecommunications Bureau (Sept. 10, 1997) (LMCC Consensus)). The LMCC Consensus provides that an application shall not be certified if an incumbent or the applicant has unacceptable interference of more than five percent reduction of the calculated service area reliability. See LMCC Consensus, Attachment at 2.

⁴⁸ See license for Station WIF539.

⁴⁹ See Adjacent Channel Study.

consistent with the LMCC Consensus criteria for operation on offset channels, and we conclude that Westchester would not cause harmful interference to Station WIF539.

16. *Television (TV) licensees.* Although consideration of TV station licensees also is not germane to the waiver criteria, part of our due diligence is to examine whether Westchester would cause harmful interference to these licensees. After June 12, 2009, TV Station WLYH-TV, Lancaster, Pennsylvania, no longer operates on TV channel 15,⁵⁰ and TV Station WNEP-TV, Scranton, Pennsylvania, no longer operates on TV channel 16.⁵¹ Nevertheless, staff has verified that Westchester meets all the spacing, power, and antenna height requirements of Sections 90.307 and 90.309 of the Commission's rules⁵² as required to protect these stations. Based on our analysis of the record and the TV licensing landscape, we find that the proposed operation would satisfy the Commission's TV protection rules.

17. *Public Interest.* In addition to finding that the relevant rules would not be undermined by a grant of the waiver request, our analysis under the first prong of the Section 1.925 waiver standard requires a finding that grant of the waiver would be in the public interest.⁵³ In the *Westchester Orders*, the former WTB/PSCID and the Bureau's Policy Division found that granting Westchester's request for frequencies from the Part 22 spectrum allocation in the 470-512 MHz band was consistent with the public interest.⁵⁴ We find that the public interest circumstances previously found to warrant grant of waiver relief continue to be present and support grant of the additional requested waiver relief. In this regard, we find that a grant of the instant application will provide Westchester with an additional channel that "will improve radio service for first responders in Westchester County without causing unacceptable interference to other incumbent licensees."⁵⁵ Moreover, notwithstanding the availability of 700 MHz band spectrum, we find it in the public interest to grant Westchester use of the requested frequency pair because it, unlike any frequencies in the 700 MHz band, is compatible with Westchester's existing system operating in the 470-512 MHz band. We therefore conclude that granting the application is consistent with the public interest. While our decision to grant Westchester's request in this instance "will improve radio service for first responders in Westchester County,"⁵⁶ we strongly urge public safety entities contemplating waivers for Part 22 and other non-public safety spectrum to consider use of the 700 MHz band to promote nationwide interoperability, consistent with the public interest.

18. *Section 20.9(a)(6).* This rule presumes that paging frequencies will be treated as common carriage services and regulated as commercial mobile radio services.⁵⁷ This regulatory structure is not applicable to, or appropriate for, frequencies used by public safety licensees. Because we find above that it is in the public interest to allow Westchester to use frequencies 476.3000 and 479.3000 MHz, we conclude that the underlying purpose of Section 20.9(a)(6) would not be served by its

⁵⁰ See license for Station WLYH-TV. It now operates in digital on TV channel 23.

⁵¹ See license for Station WNEP-TV. It now operates in digital on TV channel 50.

⁵² 47 C.F.R. §§ 90.307, 90.309.

⁵³ See 47 C.F.R. § 1.925(b)(3)(i).

⁵⁴ See *2004 Order*, 19 FCC Rcd at 23194 ¶ 12; *2005 Order*, 20 FCC Rcd at 18855-6 ¶ 10; *2007 Order*, 22 FCC Rcd 1876 ¶ 13.

⁵⁵ Waiver Request at 6.

⁵⁶ Waiver Request at 6.

⁵⁷ See 47 C.F.R. § 20.9(a)(6).

application to the present case. Accordingly, Westchester's request for relief is warranted because it satisfies the first prong of the Section 1.925 waiver standard.

IV. CONCLUSION

19. Based on the record before us, we conclude that Westchester's waiver request satisfies the criteria set forth under Section 1.925 to warrant grant of the waiver of Sections 20.9(a)(6), 22.621, and 22.651, 90.303, and 90.311, to operate a public safety communications system using offset frequencies 476.3000 and 479.3000 MHz. Accordingly, we grant the waiver request.

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, the request for waiver associated with the captioned application filed by the County of Westchester on September 3, 2008, as amended, IS GRANTED, and File No. 0003567288 SHALL BE PROCESSED consistent with this *Order* and the Commission's rules.

21. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Beers
Chief, Policy Division
Public Safety and Homeland Security Bureau